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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/034,800	12/28/2001	Blaine D. Johs		2534

7590 03/29/2004
JAMES D. WELCH
10328 PINEHURST AVE.
OMAHA, NE 68124

EXAMINER

PHAM, HOA Q

ART UNIT PAPER NUMBER

2877

DATE MAILED: 03/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/034,800	JOHS ET AL.	
	Examiner	Art Unit	
	Hoa Q. Pham	2877	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-44 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-44 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 28 December 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>12/28/01</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Drawings

1. The drawings filed on 12/28/01 have been approved.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 2, 7, 9, 12, 15, 18, 19, 22, 25, 36-38, 39, and 42 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

a. Claim 2, lines 12-15, the claimed language "less than in the case were a substantially-non-achromatic compensator utilized" is not clear, it seems like the language does not make the whole paragraph make any sense.

b. Claims 7, lines 9, 12 and 14; claim 36 lines 11, 14, 16; claim 39; and claim 42; the terms "less than/equal" are alternative.

c. Claim 12, line 16 and claim 38, step e1.; the terms "and/or" is alternative because it is not clear whether "D.C" or "A.C" or "both D.C and A.C" is claimed.

d. Claim 15, line 3; claim 18, last two lines; claim 19; claim 22, line 10; claim 25, lines 84 and 100; claims 33 and 38; the terms "and/or" are alternative.

e. Claim 19, line 6; claim 25, line 7; claim 38, line 6; it is not clear, what does applicant means by "extending between over a range of at least 200 to 800 nm"?

- f. Claims 9 and 38, line 3 from the bottom, the period "." Should be changed to --
;--.
- g. Claim 37, Claim must be ended by a period ".".

Double Patenting

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-44 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-29 of U.S. Patent No. 5,706,212 or claims 1-51 of U.S. Patent No. 6,353,477 or claims 1-43 of U.S. Patent 5,872,630. Although the conflicting claims are not identical, they are not patentably distinct from each other because the present claimed is broader than what was claimed in the patents and can be read from the patent's claims, for example, the limitation "said compensator having characteristics other than substantially-non-achromatic" in claim 1 of the present invention can be read from the narrowed limitation "the compensator means ... being essentially achromatic and of a dual rhomb construction" in claim 1 of

5,706,212; or "Berek-type, Zero-order wave plate, pseudo-achromatic," in claim 9 of 5,872,630 and claim 10 of 6,353,477.

6. The rejection above is overcome if a proper Terminal Disclaimer is filed.


7. The following is a statement of reasons for the indication of allowable subject matter: The closest references, for example, Aspnes et al (6,320,657) and Aspnes et al (6,134,012) teaches that the use of a "**non-achromatic compensator**" and do not teaches the use of an **achromatic compensator** so that the amount of phase retardation varies with wavelength, as now claimed in claims 1,2, 5,19, 25, 33, 38, 41. In addition, the limitation "**a compensator disposed in the path of the light beam, varies by less than ninety degrees over a range of wavelength, said retardance being within a range ... by (30.0) to less than (135)....angular frequency of ω** " in claims 43 and 44.

8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Following references are relative to spectroscopic ellipsometer: Aspnes et al (6,449,043; 6,650,415; US 2002/0018205); Wei et al (6,583,875), and Johs et al (6,353,477).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hoa Q. Pham whose telephone number is (571) 272-2426. The examiner can normally be reached on 7:30AM to 6 PM, Monday through Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Frank G. Font can be reached on (571) 272-2415. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Hoa Q. Pham
Primary Examiner
Art Unit 2877

HP
March 22, 2004